FILED
FEB 22 2002
OFFICE OF THE CLERK

No. 011369

In the Supreme Court of the United States

GUY PIERCE and MARK A. PIERSON,

Petitioners,

v.

RANDY BOSS and REVELL BOSS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
COLLEEN M. GRIFFIN
Counsel of Record
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-4684

Counsel for Petitioners

Printed by Authority of the State of Illinois (P.O. 29431—50—2-25-02)

44 R

QUESTION PRESENTED FOR REVIEW

Whether the majority of the Seventh Circuit unreasonably broadened the information covered by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963), when the information discovered by the prosecution was a statement from a cooperating defense witness equally available to the defense through the exercise of due diligence, simply because the Seventh Circuit found the information was an unanticipated statement as opposed to a document?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT:

CERTIORARI SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION OF THE SEVENTH CIRCUIT HAS UNREASONABLY BROADENED THE INFORMATION COVERED BY THIS COURT'S OPINION IN *BRADY v. MARYLAND*, 373 U.S. 83 (1963), WHEN THE INFORMATION DISCOVERED BY THE PROSECUTION WAS A STATEMENT FROM A CO-OPERATING DEFENSE WITNESS EQUALLY AVAILABLE TO THE DEFENSE THROUGH THE EXERCISE OF DUE DILIGENCE 4

CONCLUSION 11

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

PAGE(S)

United States Supreme Court Cases:

Brady v. Maryland,
373 U.S. 83 (1963) ..... *passim*

Kyles v. Whitley,
514 U.S. 419 (1995) 5, 8

Ramdass v. Angelone,
530 U.S. 156 (2000) 6

United States v. Agurs,
427 U.S. 97 (1976) 5, 8

United States v. Bagley,
473 U.S. 667 (1985) 5, 8, 10

Williams v. Taylor,
529 U.S. 362 (2000) 6

Other Cases:

Boss v. Pierce,
263 F.3d 734 (7th Cir. 2001) 6, 7, 8, 9

Hoke v. Netherland,
92 F.3d 1350 (4th Cir. 1996) 9

Stockton v. Murray,
41 F.3d 920 (4th Cir. 1994) 10

United States v. Dean,
722 F.2d 92 (5th Cir. 1983) 10

United States v. Dixon,
132 F.3d 192 (5th Cir. 1997) 7

United States v. Fogg,
652 F.2d 551 (5th Cir. 1981) 10

United States v. Hamilton,
107 F.3d 499 (7th Cir. 1997) 9

United States v. Hansen,
262 F.3d 1217 (11th Cir. 2001) 6, 7

United States v. Jones,
160 F.3d 473 (8th Cir. 1998) 7

United States v. Marrero,
904 F.2d 251 (5th Cir. 1990) 7

United States v. Morris,
80 F.3d 1151 (7th Cir. 1996) 6

United States v. Natale,
526 F.2d 1160 (2nd Cir. 1975) 10

United States v. Oliver,
908 F.2d 260 (8th Cir. 1990) 10

United States v. Parks,
100 F.3d 1300 (7th Cir. 1996) 7

United States v. Wilson,
901 F.2d 378 (4th Cir. 1990) 7, 9

United States v. Zagari,
111 F.3d 307 (2nd Cir. 1997) 7, 9

Additional Authority:

28 U.S.C. §2254(d)(1) 5

PETITION FOR WRIT OF CERTIORARI

Petitioners, Guy Pierce and Mark A. Pierson, respectfully ask this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Judicial Circuit to review that court's judgment and opinion entered on August 31, 2001, and its denial of Petitioners' petition for rehearing and suggestion for rehearing en banc on November 26, 2001.

OPINION BELOW

The United States Court of Appeals for the Seventh Judicial Circuit, one judge dissenting, issued its opinion reversing the decision of the United States District Court and granting habeas corpus relief on August 31, 2001. That decision is published as *Boss v. Pierce*, 263 F.3d 734 (7th Cir. 2001), and is reprinted in the appendix to this petition. The November 26, 2001 order of that Court denying Petitioners' petition for rehearing and suggestion for rehearing en banc is reported at 2001 U.S. App. LEXIS 25498 (7th Cir. Nov. 26, 2001) and is also reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on August 31, 2001, and rehearing was denied on November 26, 2001. Jurisdiction in this Court is proper under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois asserted jurisdiction in this case pursuant to 28 U.S.C. §2254, and the United States Court of Appeals for the Seventh Circuit asserted jurisdiction under 28 U.S.C. §§1291 and 2253.

Respondents Randy and Revell Boss were convicted by a Cook County, Illinois jury of the first degree murder and robbery of Eugene Oliver. The trial court sentenced Randy Boss to concurrent terms of 50 years for murder and seven years for robbery, and sentenced Revell Boss to 40 years for murder and seven years for robbery. On March 15, 1996, the Illinois appellate court, first judicial district, affirmed Respondents' convictions and sentences. *People v. Boss*, 278 Ill.App.3d 1129, 699 N.E.2d 604, 1996 Ill.App.LEXIS 1187 (Unpublished order under Illinois Supreme Court Rule 23).

On April 23, 1997, Respondents filed petitions for writs of habeas corpus pursuant to 28 U.S.C. §2254, asserting, amongst other claims of error, that the state withheld exculpatory evidence in violation of this Court's ruling in *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioners filed an Answer to the petitions, and on September 14, 1998, the district court denied Respondents' petitions for writ of habeas corpus. *Boss v. DeTella*, No. 97 C 2874 (U.S. Dist. 1998). On October 15, 1998, the district court issued a minute order finding the *Brady* issue sufficiently uncertain as to warrant a certificate of appealability under the standard of 28 U.S.C. §2253(c)(2).

Respondents filed their brief on September 24, 1999. On February 3, 2000, the Petitioners filed their brief, and on February 22, 2000, Respondents filed their reply brief. Oral arguments were heard on April 18, 2000, and the case was taken under advisement. On August 31, 2001, the United States Court of Appeals for the Seventh Judicial Circuit, with one judge dissenting, reversed the decision of the dis-

trict court denying Respondents' petitions for writ of habeas corpus, and remanded the case with instructions to grant Respondents' writs of habeas corpus unless the state retried Respondents within 120 days. The majority found that the state appellate court's determination that no evidence was suppressed by the prosecution since the witness who gave the statement to the prosecution was a cooperating defense witness, equally available to the defense, was an "unreasonable application of" *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *Boss v. Pierce*, 263 F.3d 734, 742-743 (7th Cir. 2001). The majority found that, unlike information contained in a document, exculpatory information contained in a cooperating defense witness' head cannot be considered to be available to defense counsel through the exercise of due diligence if not specifically anticipated as information that the witness would possess, since mind-reading is beyond the abilities of even the most diligent attorney. *Boss*, 263 F.3d at 742-743. The majority believed that the state appellate court's ruling suggested that reasonable diligence required Respondents' counsel to ask the witness the specific question to elicit the response, in this case asking the defense witness what the key eyewitness had been saying around the neighborhood regarding the fact that he, in fact, had committed the crime. *Boss*, 263 F.3d at 743. The majority found that requiring defense counsel to ask his witness the specific question to elicit the information gained by the prosecution was an unreasonable application of *Brady* and its progeny to the facts of this case. *Id.* The majority added that this Court has described the *Brady* rule as applying to information known to the prosecution but "unknown" to the defense, and while it was reasonable to apply that precedent to information the defense can be expected to discover, counsel could not have been expected to discover that his own witness knew the state's key eyewitness had been stating in the neighborhood that he had committed the crime. *Boss*, 263 F.3d at 744.

On September 13, 2001, Petitioners filed their petition for rehearing with suggestion for rehearing en banc. The court ordered Respondents to reply to the petition for rehearing, and Respondents did so on October 9, 2001. On November 26, 2001, the Court of Appeals denied Petitioners' petition for rehearing, and on December 10, 2001 issued an order granting Petitioners' petition to stay issuance of the mandate pending the filing of this Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION OF THE SEVENTH CIRCUIT HAS UNREASONABLY BROADENED THE INFORMATION COVERED BY THIS COURT'S OPINION IN *BRADY v. MARYLAND*, 373 U.S. 83 (1963), WHEN THE INFORMATION DISCOVERED BY THE PROSECUTION WAS A STATEMENT FROM A COOPERATING DEFENSE WITNESS EQUALLY AVAILABLE TO THE DEFENSE THROUGH THE EXERCISE OF DUE DILIGENCE.

The majority opinion of the United States Court of Appeals for the Seventh Judicial Circuit in the case below found that it was an "unreasonable application of" this Court's opinion in *Brady v. Maryland*, 373 U.S. 83 (1963), for the state appellate court to hold that the information garnered by the prosecution from the Respondents' own cooperating defense witness was equally available to the defense, and thus not covered by *Brady*. In so finding, the majority below has unnecessarily and unreasonably broadened the information which this Court has determined is covered by *Brady* to include information obtained by the state from a cooperating defense witness[1] through an

---

[1] The information that the prosecution obtained from the cooperating defense witness four days prior to trial was that the (continued...)

interview with that witness, equally available to defense counsel, merely if defense counsel fails to ask the correct question to garner that information through the exercise of due diligence. The majority incorrectly applied this Court's rulings in *Kyles v. Whitley*, 514 U.S. 419 (1995), *United States v. Bagley*, 473 U.S. 667 (1985), and *United States v. Agurs*, 427 U.S. 97 (1976), and found that "actual knowledge" is the key consideration in determining whether non-documentary evidence is available to the defense for *Brady* purposes, contrary to the decisions which have interpreted *Brady* as only applying to information not available to defense counsel through due diligence. The majority further has placed an unreasonable burden on prosecutors to determine what statements garnered by them through an interview with a cooperating defense witness could be said to be information defense counsel would have known that witness possessed, or if the statement pertained to knowledge defense counsel did not know the witness possessed, in order to determine what they need to turn over as *Brady* material.

The federal habeas corpus statute authorizes relief if the state court adjudication of a federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). The majority in this case found that the state appellate court's decision was not "contrary to" clearly established Federal law, as determined by the Supreme

---

[1] (...continued)
state's main witness against the Respondents was bragging to people, including one Richard Mitchell, that he in fact, committed the crimes for which Respondents were convicted. The state revealed this information in a report of its interview with the witness on the last day of Respondents' trial. A motion for a continuance made by Respondents was denied by the trial court.

Court of the United States, but found that the decision involved an "unreasonable application" of clearly established Federal law. *Boss v. Pierce*, 263 F.3d 734, 741 (7th Cir. 2001). However, a state determination may be set aside under this standard only if, under clearly established Federal law, the state court was unreasonable in refusing to extend the governing legal principle that should have controlled. *Ramdass v. Angelone*, 530 U.S. 156, 165 (2000). A Federal court may not grant habeas corpus relief simply because it has independently concluded that the relevant state court decision misapplied clearly established Federal law; the decision's application of Supreme Court precedent must be so erroneous as to be unreasonable. *Williams v. Taylor*, 529 U.S. 362, 409-410 (2000). Not only was the state appellate court's decision in this case not an unreasonable application of clearly established Federal law, it was the correct application of that law. The majority independently concluded that the state court decision misapplied clearly established Federal law, and in so doing, issued an opinion wherein that court unreasonably broadened the information covered by this Court's opinion in *Brady* and its progeny.

In *Brady v. Maryland*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." *Brady*, 373 U.S. at 87. To make out a *Brady* violation, a defendant must establish that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material to an issue at trial. It has been well-recognized that the government will not be found to have suppressed material information if that information also was available to a defendant through the exercise of reasonable diligence. *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996). See also *United States v. Hansen*, 262 F.3d 1217, 1235 (11th

Cir. 2001); *United States v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990), *United States v. Zagari*, 111 F.3d 307, 320 (2nd Cir. 1997), *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997). While the majority below recognized this principle, it failed to properly analyze what constitutes due diligence, and in so doing, greatly expanded the information the prosecution is required to disclose, and greatly limited what a defense counsel is required to do.

Again, where information is equally available to the defense as to the prosecution, the defendants cannot obtain a new trial by insisting that the government should have conducted their investigation for them. *United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996), *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990). To defeat a *Brady* claim, the defense need not be aware of the specific details of the exculpatory information or precisely what it is so long as the defense knew of and had access to the material that contained, or the witness who possessed, such information, in other words, where "defendants had been given the same opportunity as the government to discover the identified documents." *Parks*, 100 F.3d at 1307.

In finding that the state appellate court's decision was an unreasonable application of *Brady* and its progeny, the majority in this case determined that it was an unreasonable application of *Brady* for the state court to rule that information possessed by a defense witness was available through the exercise of due diligence where that information is not of a type defense counsel could reasonably expect that witness to possess. *Boss*, 263 F.3d at 742. In so finding, the majority misconstrued the appellate court's ruling as suggesting that reasonable diligence on the part of defense counsel required him to ask the witness the specific question to get the information obtained by the prosecution. *Boss*, 263 F.3d at 742-743. The court also misconstrued the appellate court's opinion as suggesting a blanket rule that

every piece of knowledge in a defense witness' head should be discovered by counsel merely because of the relationship of the witness, regardless of the circumstances of the case. This is not, however, what the appellate court decided. The appellate court simply found that, where the prosecution had no greater access to the cooperating defense witness or her information than defense counsel, and no greater means than defense counsel to garner the information obtained, requiring defense counsel to interview his witness sufficiently was a reasonable requirement of a reasonably diligent attorney.[2]

The Seventh Circuit's majority decision has severely minimized what a defense counsel must reasonably be expected to do. The majority's decision suggests that this Court has implied a focus on actual knowledge as the key consideration in determining whether evidence is available to the defense for *Brady* purposes. *Boss*, 263 F.3d at 743-744, citing to this Court's descriptions in *Kyles v. Whitley*, 514 U.S. 419 (1995), *United States v. Bagley*, 473 U.S. 667, 678 (1985), and *United States v. Agurs*, 427 U.S. 97, 103 (1976) to information known to the prosecution but "unknown to the defense." However, those statements are made in the context of determining what is material for purposes of disclosure. While the majority correctly recognized that refusing to characterize as *Brady* material information the defense can be expected to discover is consistent with a focus on actual knowledge, the court continued that "[F]urther extension of the limits on *Brady* material to include information the defense could not be expected to discover cannot be reconciled with such a focus." *Boss*, 263 F.3d at 743. However, the court's interpretation of what counsel should be expected to discover is inconsistent with the cases

---

[2] The Seventh Circuit suggested that the appellate court's decision required defense counsel to be a "mind-reader." *Boss*, 263 F.3d at 741.

interpreting *Brady*. See *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (there is no *Brady* violation if the information is not only available to defendant but also lies in a source where a reasonable defendant would have looked.)

The majority's opinion also suggests that there is a distinction between the fact that the information here was not contained in a document, but in the defense witness' mind, and thus defense counsel cannot be accountable for not uncovering the information. However, the reasonable diligence requirement has frequently been applied to evidence that was unwritten. See, e.g., *United States v. Zagari*, 111 F.3d 307, 320 (2nd Cir. 1997), *Hoke v. Netherland*, 92 F.3d 1350, 1355-56 (4th Cir. 1996). As noted by the dissent in this case, "Indeed, obtaining information through questioning often requires less diligence than sorting through papers." *Boss*, 263 F.3d at 747.

The majority's opinion is also inconsistent with the Seventh Circuit's own previous rulings. In *United States v. Hamilton*, 107 F.3d 499 (7th Cir. 1997), that court reiterated the well-established principle that the government will not be found to have suppressed information if that information was available to the defense through the exercise of due diligence. *Hamilton*, 107 F.2d at 510. The court noted that Hamilton had hired an investigator who interviewed the witness and could have questioned him about previous descriptions. As found by the district court in *Hamilton*, "any investigator worth his or her salt would have asked [the witness] had he given any statements." *Hamilton* does not rest on the defense's possession of information indicating what specific question should have been asked. Rather, it rests on the simple fact that the bank teller in *Hamilton* was a witness the defense should have known to ask whether he had given any prior statements to the police. Here, defense counsel merely had to ask his own cooperating witness if she had any information which would be helpful

to the defense. Requiring such was not unreasonable. The fact that the proposed information was contained in a witness' mind rather than a document is not a reason for excusing defense counsel's failure to uncover information known by one of its own cooperating witnesses, especially where the defense knew of and had at least the same access to the information as the prosecution.

It is simply not an unreasonable application of *Brady* to rule that information possessed by a cooperating defense witness was equally available to the defense through the exercise of reasonable diligence by a simple interview or investigation. Cases denying *Brady* claims have often relied on the fact that the witness with the exculpatory material was either a defense witness or cooperated with the defense. See *Stockton v. Murray*, 41 F.3d 920, 925 (4th Cir. 1994), *United States v. Dean*, 722 F.2d 92, 95 (5th Cir. 1983), *United States v. Natale*, 526 F.2d 1160, 1171 (2nd Cir. 1975), *United States v. Fogg*, 652 F.2d 551, 559 (5th Cir. 1981), *United States v. Oliver*, 908 F.2d 260, 262 (8th Cir. 1990). The question is whether the information was equally available to the defense as to the prosecution through the exercise of due diligence.

The majority's decision here directly conflicts with the decisions which find that *Brady* material does not include material equally available to defendant through the exercise of due diligence, and unreasonably and unnecessarily expands the information subject to disclosure under *Brady* to include such information. The *Brady* rule is to "ensure that a miscarriage of justice does not occur, 'not to displace the adversary system as the primary means by which truth is uncovered.'" *Bagley*, 473 U.S. at 675. Contrary to the implied holding in this case, *Brady* does not require the prosecution to conduct a defendant's investigation or to assist in the presentation of the defense's case. In fact, the holding in this case places an unreasonable burden on the prosecution to decide, after interviewing a cooperat-

ing defense witness, what information defense counsel knew or did not know existed, and then tender the information defense counsel could not have known of, instead of allowing the prosecution to rely on an assumption that defense counsel conducted a thorough and adequate interview of his own witness. Certiorari should be granted to clarify what a reasonable defense attorney must do, and to halt this unreasonable requirement of what the prosecution must do.

CONCLUSION

For the aforementioned reasons, Petitioners, Guy Pierce and Mark A. Pierson, respectfully request that this Honorable Court grant *Certiorari*, reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand for further proceedings.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
COLLEEN M. GRIFFIN
Counsel of Record
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-4684

Counsel for Petitioners

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3665

RANDY BOSS and REVELL BOSS,

Petitioners-Appellants,

v.

GUY PIERCE and MARK A. PIERSON,*

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2874—**James B. Moran**, *Judge.*

ARGUED APRIL 18, 2000—DECIDED AUGUST 31, 2001

Before FLAUM, *Chief Judge*, and RIPPLE, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.* Randy and Revell Boss[1] seek writs of habeas corpus overturning their state robbery and

---

* Since the filing of this appeal, both petitioners have been moved to new prisons; Randy Boss to Pickneyville Correctional Center and Revell Boss to Hill Correctional Center. We have substituted the wardens of those institutions, Guy Pierce and Mark A. Pierson, respectively, as the respondents in this case pursuant to Fed. R. App. P. 23(a).

[1] Collectively, we refer to them as the Bosses. To avoid confusion, we will use first names when referring to them separately. We will also follow this practice for individuals in this opinion who share the same last name.

murder convictions. They argue that during their trial prosecutors unconstitutionally withheld from them material evidence favorable to their defense, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The district court concluded that this argument did not warrant habeas corpus relief. Because we believe the Bosses have adequately established the elements of a *Brady* violation, we reverse.

I. BACKGROUND

A. The Facts

At the Bosses' joint trial, the state sought to prove that the Bosses, along with two co-defendants who were tried separately, Nikia Harris and Corey Carter, robbed and beat to death Eugene Oliver, a 52-year-old neighborhood resident. Robert McAfee, a teenager at the time of the attack, was the only witness the government called to testify about the robbery and murder.[2] His direct testimony is summarized below.

McAfee was riding his bicycle home from Garfield Park in Chicago on September 6, 1993, at approximately 10:45 p.m. He stopped at the corner of Franklin and Drake and talked to a girl who was leaning out of a window. After about a minute, the conversation ended, and McAfee saw four men and a woman standing across the street outside the senior citizens' home, drinking beer. Although he did not recognize the woman, he recognized the four men—Randy, Revell (identified as "Vell"), Keater, and Corey.[3]

---

[2] The state called four other witnesses: Chicago Police Detective Gene Harris; Oliver's girlfriend, Beulah Williams; Assistant Cook County Medical Examiner Larry Simms; and paramedic Larry Del Dotto. But none of these witnesses offered testimony linking the Bosses to the attack on Oliver.

[3] He later identified them in court.

While still looking across the street, McAfee saw Eugene Oliver leave the senior citizens' home and walk toward Franklin. Randy, Vell, Keater, and Corey followed Oliver. As they walked to the corner of Franklin and Drake, Randy approached McAfee and asked if he could use his bicycle. After McAfee refused, Randy simply took the bicycle and rode off. McAfee gave chase.

Meanwhile, Oliver had turned left onto Franklin and walked to Central Park. On McAfee's bicycle, Randy caught up with Oliver and threw the bicycle at Oliver's legs, which caused Oliver to fall to the ground. Although McAfee could not remember where they came from, Vell, Keater, and Corey had by this point made their way to Central Park. All four began to beat Oliver. They repeatedly kicked Oliver in the face and on his side. Randy picked up the bicycle and threw it on Oliver's head three times. The beating lasted about a minute, and left Oliver motionless on the ground. Afterwards, Randy reached into Oliver's pocket and removed something.

As Randy, Vell, Keater, and Corey left the scene of the attack, they walked past McAfee, who had seen the attack from across the street. Randy told McAfee, "Don't say nothing, don't tell nobody." McAfee also noticed that Randy had a $20 bill in his hand, and he heard Randy talking about purchasing some beer.

Once they were gone, McAfee retrieved his bicycle from the park.[4] The crank was so bent he had to push the bicycle home. Because of Randy's threat, McAfee kept quiet about Oliver's beating until he was questioned by the police.

At trial, during cross-examination, defense counsel questioned McAfee about a juvenile manslaughter adjudica-

---

[4] The bicycle was introduced in evidence, and McAfee identified it as the bicycle used in the attack.

tion that arose out of his accidental shooting of a friend, for which he was still on probation. McAfee admitted that he first lied to the police regarding his role in his friend's death because he was scared. With respect to the Oliver beating, he admitted that he was scared when the police brought him in for questioning. Defense counsel also elicited testimony from McAfee suggesting that the police may have initially suspected him as having been involved in the attack on Oliver.[5]

The four witnesses called by the defense told a different story. Antonio Shanklin testified that he saw four or five boys who he had never seen before beating Oliver. He identified McAfee as the one who picked up a bicycle and hit Oliver with it. Afterwards, McAfee fixed the chain on the bicycle and rode off, joining the other boys who had begun to flee the scene. As they fled, they went past Shanklin, and he had a good chance to look at them.

Shanklin also testified that he had known the Bosses for about three years, and he was certain they were not among the group of boys fleeing the scene. In fact, he stated that he saw Revell on the east side of Central Park while Oliver was being beaten on the west side of the park. On cross-examination, Shanklin admitted that he came forward to testify at the request of the Bosses' family.[6]

Contina Hill, Randy's girlfriend and his child's mother, stated that on the day of the crime, Randy was with her at

---

[5] Detective Harris, in his testimony, insisted that McAfee was merely a witness, but police records and certain circumstances surrounding McAfee's questioning by the police cast some doubt on that assertion.

[6] Shanklin, like each of the defense witnesses, also admitted that he never contacted the police or the State's Attorney's Office about his knowledge regarding the crime. However, Shanklin, and both Hill sisters, testified that they did speak to the Bosses' attorneys not long after the Bosses were charged.

the apartment she shares with her mother and other family members, enjoying a Labor Day barbeque. He left the apartment only twice. Sometime in the afternoon, he went downstairs to the apartment of Corey Carter's cousin, Gregory Carter. That night, he went out with Gregory and two other men and returned a short time later with beer. Randy left for good much later that night. Sometime late that night Revell came by and spent some time at the Hills' apartment. Janice Hill, Contina's sister, corroborated her sister's testimony and added that when Randy left the apartment the second time, he was gone approximately 15 minutes.

Tonya Gist, a neighbor of the Hills, testified that on the night of the crime, near Central Park, she saw McAfee fighting with an older man from the senior citizens' home. She went home, and when she arrived, she saw Randy sitting on the back porch she shared with the Hills. He was still there when she locked the gate later that evening. Also, at some point during the evening, Gist saw Revell on the porch.

On the last day of the Bosses' two-day trial, the state gave the Bosses an investigative report summarizing an interview of Janice Hill conducted four days before the trial began. This report revealed that Janice told the state investigator information unknown to defense counsel: (1) that McAfee had been bragging to people about what he and his friends had done to Oliver; and (2) that McAfee had told Richard Mitchell that he had only implicated Randy, Revell, and the other defendants in the Oliver attack so that he would not get in trouble. Based on this information, defense counsel moved for a continuance so that they could locate Richard Mitchell. The trial judge denied the motion.

The trial went forward, and the jury found Randy and Revell guilty of both first-degree murder and robbery. After the trial, but before sentencing, new defense counsel fol-

lowed up on the Janice Hill information. Counsel located and talked to Richard Mitchell. According to Mitchell, McAfee admitted that he, not the defendants, had committed the offense. Counsel also collected written statements from Marcus Fowler and Ricky Boss to the same effect. Based on this material, counsel filed a motion for a new trial,[7] but the trial judge denied the motion. The trial judge then sentenced Randy to concurrent prison terms of fifty years for murder and seven years for robbery, and sentenced Revell to concurrent prison terms of forty years for murder and seven years for robbery.

B. Post-Conviction Proceedings

The Bosses appealed their convictions to the Illinois Appellate Court, claiming, among other things, that the State's Attorneys prosecuting their case violated *Brady v. Maryland*, *supra*, by withholding the investigative report summarizing Janice Hill's interview with the state investigator. The Appellate Court affirmed their convictions. In rejecting the Bosses' *Brady* claim, the Appellate Court concluded that the Bosses could satisfy none of the requirements for a *Brady* claim, as the investigative report was not suppressed by the state, favorable to the defense, or material, under *Brady*. The Bosses sought review in the Illinois Supreme Court, but their petition was denied without an opinion.

The Bosses then turned to federal court and filed a petition for a writ of habeas corpus in the District Court for the Northern District of Illinois, raising the same claims. Concluding that the information in the investigative report was

---

[7] Actually, defense counsel's second amended motion for a new trial, supplementing two previous motions, incorporated this newly discovered material.

not suppressed by the state, the district court denied the writ. The district court granted them a certificate of appealability, and the Bosses filed this appeal with respect to their *Brady* claim.[8]

II. ANALYSIS

A. Habeas Corpus and 28 U.S.C. § 2254(d)(1)

In considering a habeas corpus petition filed by a state prisoner that challenges the prisoner's conviction or sentence on legal grounds, federal courts employ the standards set forth in 28 U.S.C. § 2254(d)(1). Under this provision, a federal court may grant a writ of habeas corpus only if the adjudication of the prisoner's claims in state court resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." As the Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), section 2254(d)(1) establishes two independent grounds on which a federal court can grant habeas corpus relief: (1) if a state court decision is *contrary to* clearly established federal law, as determined by the Supreme Court, or (2) if a state court decision involves an *unreasonable application of* clearly established federal law, as deter-

---

[8] Under 28 U.S.C. § 2253(c), a habeas corpus petitioner challenging her conviction or sentence may appeal an adverse district court decision only with respect to those issues on which she has been granted a certificate of appealability. The Bosses ask us to expand their certificate of appealability to include various claims in addition to their *Brady* claim, but on none of these claims have the Bosses made "a substantial showing of the denial of a constitutional right," as they must before a certificate of appealability can be issued, 28 U.S.C. § 2253(c)(2). Therefore we deny the Bosses' request to expand their certificate of appealability.

mined by the Supreme Court. *Id.* at 404-05; *see also Washington v. Smith*, 219 F.3d 620, 627-28 (7th Cir. 2000).

The "contrary to" standard requires a state court decision to be "substantially different from the relevant precedent of [the Supreme Court]." *Williams*, 529 U.S. at 405. For example, a state court decision applying a rule that contradicts the governing law set forth by the Supreme Court would qualify, as would a decision that involves a set of facts materially indistinguishable from a Supreme Court case that arrives at a different result. *Id.* at 405-06. By contrast, a state court decision that draws from Supreme Court precedent the correct legal rule and applies it in a factually distinguishable situation will not satisfy the "contrary to" standard, no matter how misguided the decision's ultimate conclusion. *Id.* at 406-07.

Errors in the application of Supreme Court precedent are governed by the "unreasonable application of" standard. "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case" qualifies as a decision involving an unreasonable application of clearly established federal law. *Id.* at 407-08. Whether an application of federal law is unreasonable is not a simple question to answer, as "unreasonable" is a difficult term to define without reference to a particular set of facts. Still, *Williams* provides guidance. First, reasonableness is judged objectively, not subjectively. *Id.* at 409-10. Thus, the fact that judges may disagree about the proper application of a precedent does not affect the reasonableness of a particular application of that precedent. Second, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). Therefore, a federal court may not grant habeas corpus relief simply because it has independently concluded that the relevant state court decision misapplies clearly established federal law. The decision's

application of Supreme Court precedent must be so erroneous as to be unreasonable.

In *Williams*, the Supreme Court also explained the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States." It characterized the phrase as referring to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. Therefore, in order to grant habeas corpus relief under section 2254(d)(1), a federal court must be able to point to the holding of a Supreme Court decision handed down before the state courts issued the decision under review.

B. *Brady* Violation

With these standards in mind, we turn to the Bosses' *Brady* claim. Under *Brady v. Maryland*, *supra*, and its progeny, the prosecution has an affirmative duty to disclose evidence that is both favorable to the defense and material to either guilt or punishment. *Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995); *United States v. Bagley*, 473 U.S. 667, 674-75 (1985); *Brady*, 373 U.S. at 87. The suppression of such evidence deprives the defendant of a fair trial and thus violates due process. *Brady*, 373 U.S. at 86-87. To establish a *Brady* violation, a defendant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to an issue at trial. *United States v. Walton*, 217 F.3d 443, 450 (7th Cir. 2000); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996). The state does not contest the Bosses' contention that the investigative report summarizing Janice Hill's interview with the state investigator was favorable to

the defense.[9] Therefore, we focus our attention on suppression and materiality, the other two elements of a *Brady* claim.

1. Suppression.

Evidence is suppressed for *Brady* purposes only if (1) the prosecution failed to disclose evidence that it or law enforcement was aware of before it was too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence. *United States v. Earnest*, 129 F.3d 906, 910 (7th Cir. 1997); *Morris*, 80 F.3d at 1169-70; *United States v. Zambrana*, 841 F.2d 1320, 1340 (7th Cir. 1988). The state here contests whether the information Janice Hill related to the state investigator was available to the Bosses through the exercise of reasonable diligence. Specifically, the state argues that Janice Hill was a defense witness and, therefore, the Bosses had ample access to any information she possessed. Both the district court and the Illinois Appellate Court accepted this argument and found that the prosecution had not suppressed the evidence in the investigative report.

We are of the view, however, that the state's argument rests on far too expansive an understanding of what sort of

---

[9] Nor could it. As the district court recognized, the information in the investigative report has, at the very least, impeachment value, and impeachment evidence is favorable to the defense, *Bagley*, 473 U.S. at 676; *Crivens v. Roth*, 172 F.3d 991, 996 (7th Cir. 1999). In considering this element of the Bosses' *Brady* claim, the Illinois Appellate Court appears to have proceeded on the assumption that suppressed evidence must be exculpatory to satisfy the requirements of *Brady*. Such an assumption is contrary to then clearly established Supreme Court precedent. *See Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

evidence should be considered available to a defendant through the exercise of reasonable diligence. We regard as untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes. To begin with, it is simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses. Sometimes, a defense witness may be uncooperative or reluctant. Or, the defense witness may have forgotten or inadvertently omitted some important piece of evidence previously related to the prosecution or law enforcement. Or, as may have been the case here, the defense witness learned of certain evidence in the time between when she spoke with defense counsel and the prosecution.

Putting aside these situations in which it would be nearly impossible for defense counsel to discover evidence in the possession of defense witnesses, accepting the state's position would place a burden on defense counsel that goes far beyond what reasonable diligence demands. Defense counsel can certainly be expected to ask witnesses (defense and otherwise) questions relevant to what counsel understands the witness's role to be in the case. However, defense counsel cannot be expected to ask witnesses about matters completely unrelated to the witness's role in the case. A contrary conclusion would require defense counsel to conduct a fishing expedition with every defense witness (and potential defense witness). Reasonable diligence does not require such a practice.

We also find it significant that a defense witness's knowledge is quite different from the type of evidence typically found to be available to defense counsel through the exercise of reasonable diligence. In the typical reasonable diligence case, the question is whether defense counsel had access to the document containing the *Brady* material, through an open file policy, for example. *See, e.g., United*

States v. White, 970 F.2d 328, 337 (7th Cir. 1992). In cases like the present one, the question is whether defense counsel had access to *Brady* material contained in a witness's head. *See, e.g., Crivens v. Roth*, 172 F.3d 991, 997 (7th Cir. 1999). Because mind-reading is beyond the abilities of even the most diligent attorney, such material simply cannot be considered available in the same way as a document. But, the position the state advances would require a defense witness's knowledge to be treated exactly as information in a document the defense possesses. This stretches the concept of reasonable diligence too far.

Still, the ultimate question we must answer in this case is whether the Illinois Appellate Court's ruling—that because Janice Hill was a defense witness, the information she possessed was available to the Bosses through the exercise of reasonable diligence—"was contrary to, or an unreasonable application of clearly established federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). *Brady* and its most notable progeny (*United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, *supra*; *Kyles v. Whitley*, *supra*), all of which were decided prior to the conclusion of the Bosses direct appeal, represent the relevant, clearly established federal law.[10] And, the Appellate Court's ruling is not so inconsistent with these cases that it can be characterized as "contrary to" them. Thus, we focus on

---

[10] We recognize that the Supreme Court has decided other cases involving *Brady* claims, *see, e.g., Strickler v. Greene*, 527 U.S. 263 (1999); *Wood v. Bartholomew*, 516 U.S. 1 (1995); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *Moore v. Illinois*, 408 U.S. 786 (1972); *Giglio v. United States*, 405 U.S. 150 (1972), but the three cited are the most significant decisions that identify the legal standards governing *Brady* claims. *See* 5 Wayne R. LaFave et al., *Criminal Procedure* § 24.3(b), at 473-90 (2d ed. 1999) (relying predominantly on these cases in describing the relevant standards).

whether the Appellate Court's decision is an "unreasonable application of" *Brady* and its progeny. We conclude that it was.

When faced with the task of determining whether a particular application of Supreme Court precedent is unreasonable, we have often taken a more pragmatic approach to answering the question, scrutinizing the practical operation and effect of the principles at issue in the particular facts of the case. *See, e.g., Miller v. Anderson*, 255 F.3d 455, 456-59 (7th Cir. 2001); *Redmond v. Kingston*, 240 F.3d 590, 591-92 (7th Cir. 2001); *Washington v. Smith*, 219 F.3d 620, 627-35 (7th Cir. 2000). We ask whether the decision is "at least minimally consistent with the facts and circumstances of the case" or "if it is one of several equally plausible outcomes," *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997); *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997), granting a writ of habeas corpus if the determination is "at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary" as to be unreasonable. *Hall*, 106 F.3d at 749.

For instance, in *Redmond v. Kingston*, *supra*, this court considered whether a Wisconsin court of appeals' decision to affirm a state trial court's exclusion of evidence (that the alleged statutory rape victim in the case had lied about a prior report of forcible rape) was an unreasonable application of Supreme Court Confrontation Clause precedent. The defendant was on trial for allegedly trading cocaine for sex with the minor, who was institutionalized at the drug rehabilitation center where the defendant was a counselor. Her testimony was the only evidence of the defendant's guilt. The Wisconsin court upheld the exclusion of the prior false forcible rape report against the constitutional challenge, stating that it was cumulative of other credibility evidence and was confusing (the prior incident involved consent, which was not an element in that case). Therefore, they concluded that its probative value was outweighed by

its inflammatory and prejudicial nature, justifying exclusion under the state's rape-shield law and the Constitution.

We held that this decision was unreasonable. *Redmond*, 240 F.3d at 591. The "other credibility" evidence was that the minor began using drugs at the age of twelve, had stolen and occasionally danced to get money for cocaine, had run away from the institution, skipped school and told lies in the past. We stated that "none of the other evidence either involved a false charge of being sexually assaulted or furnished a motive for such a charge." *Id.* Thus, the nature of the credibility evidence excluded was entirely different from that admitted, and we rejected as unreasonable the Wisconsin court's suggestion that the evidence was cumulative.

In addition, we concluded that there was no danger of confusion to the trier of fact, and that the assumption upon which the Wisconsin court made its determination was faulty. The Wisconsin court believed that admitting the evidence of the prior false rape report would require (or permit) the victim to testify that she had consensual sex with the alleged rapist, and that would lead to confusion and misperception of issues in the case. *Id.* at 592. We rejected this conclusion, because the only evidence relevant to the case was that the victim had made up a story of forcible rape within the preceding year. This evidence did not require any inquiry into whether there was sexual intercourse, and we saw no reason why anyone would reach a conclusion to the contrary. *Id.* We held that the evidence was "highly probative, noncumulative, nonconfusing, [and] nonprejudicial . . . [and] vital to the central issue in the case," and should not have been excluded. The defendant had a constitutional right to have it admitted. *Id.*

As our analysis in *Redmond* illustrates, careful review of the evidence and reasons supporting the decision is required in determining the reasonableness of a state court's

decision. It is that type of examination in which we engage today.

Here, the Illinois Appellate Court's ruling that reasonable diligence required the Bosses' counsel to ask Janice Hill about what McAfee had been saying around the neighborhood regarding the attack on Eugene Oliver is an unreasonable application of *Brady* and its progeny. The Bosses' counsel could not have reasonably expected Janice Hill to have knowledge regarding this topic. Janice was simply an alibi witness whom defense counsel planned to have testify to Randy's whereabouts on the night of the crime. Nothing about her role in the case suggested that she might also have knowledge regarding what the prosecution's chief witness was saying around the neighborhood.

Holding that reasonable diligence requires defense counsel to ask witnesses about matters of which counsel could not have reasonably expected a witness to have knowledge is inconsistent with the aim of *Brady* and its progeny. *Brady* and its progeny strike a careful balance between maintaining an adversarial system of justice and enforcing the prosecution's obligation to seek justice before victory. *See, e.g.*, *Kyles*, 514 U.S. at 439 ("Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result."); *Bagley*, 473 U.S. at 675 n.6 ("The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he is the representative not of an ordinary party to a controversy, but of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." (internal quotation marks and ellipses omitted)); *Brady*, 373 U.S. at 87-88 ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to excul-

pate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .").

Allowing the government to withhold favorable material evidence that it receives from defense witnesses upsets the balance *Brady* and its progeny strike. The consequence of adopting the state's position would work a real injustice. In effect, it would punish the defense for not obtaining evidence it had no reason to believe existed.

The Illinois Appellate Court's ruling regarding what reasonable diligence requires is also inconsistent with *Brady* and its progeny in a more particular sense. The Supreme Court has described the *Brady* rule as applying to information known to the prosecution but "unknown to the defense." *Kyles*, 514 U.S. at 437; *Bagley*, 473 U.S. at 678 (opinion of Blackmun, J.); *Agurs*, 427 U.S. at 103. This description suggests a focus on actual knowledge as the key consideration in determining whether evidence is available to the defense for *Brady* purposes. Still, it would be a reasonable application of this precedent to hold that the *Brady* rule does not apply to information the defense can be expected to discover. Refusing to characterize as *Brady* material information the defense can be expected to discover serves to weed out incredible claims of ignorance, to prevent sandbagging, and is consistent with a focus on actual knowledge. Further extension of the limits on *Brady* material to include information the defense could not be expected to discover cannot be reconciled with such a focus. *See* 5 Wayne R. LaFave et al., *Criminal Procedure* § 24.3(b), at 486-87 (2d ed. 1999) (drawing a similar distinction). Extending the limits on *Brady* material in this way would be inconsistent with what the Supreme Court has said regarding when undisclosed evidence is available to the defense.

Finally, the state does not cite, and we have not found, a single case applying *Brady* and its progeny in the fashion

advanced by the state. Of the few cases we have discovered involving whether the defense had access to information possessed by a witness, none demanded inquiry into matters defense counsel could not have been expected to ask about. *See, e.g.*, *Crivens*, 172 F.3d at 997; *United States v. Hamilton*, 107 F.3d 499, 510 (7th Cir. 1997); *cf. United States v. Senn*, 129 F.3d 886, 892-93 (7th Cir. 1997); *United States v. Rodriguez-Andrade*, 62 F.3d 948, 952 (7th Cir. 1995); *United States v. Hedgeman*, 564 F.2d 763, 769 (7th Cir. 1977). In fact, in *Hamilton*, this court, finding that certain information possessed by a witness was available to the defense for *Brady* purposes, made clear that it was more than reasonable to expect an investigator hired by the defense to inquire after the information at issue. 107 F.3d at 508-09 (quoting the district court's finding that "'any investigator worth his or her salt would have asked Mr. Painter had he given any statements'"). This authority (and lack of authority) confirms our belief that it would be an unreasonable application of *Brady* and its progeny to rule that information possessed by a defense witness is available through the exercise of reasonable diligence where that information is not of a type defense counsel could reasonably expect that witness to possess.

In sum, we find that the Illinois Appellate Court unreasonably applied *Brady* and its progeny in ruling that reasonable diligence required the Bosses' counsel to ask Janice Hill about what McAfee had been saying around the neighborhood regarding the attack on Oliver. And we also conclude that the Bosses have satisfied the standard for habeas corpus relief with respect to the suppression requirement for a *Brady* claim.[11]

---

[11] We need not address Revell Boss's alternative argument that his attorney acted with reasonable diligence because Janice Hill was Randy's alibi witness.

2. Materiality.

Turning to the final prong, suppressed evidence is material for *Brady* purposes "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433-34 (quoting *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.)). Such a probability exists where the suppressed evidence, or evidence that is derived directly from the suppressed evidence, undermines confidence in the outcome reached. *Kyles*, 514 U.S. at 434; *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.); *see also United States v. Dimas*, 3 F.3d 1015, 1018 (7th Cir. 1993).

The state argues that the evidence discovered on the basis of the information Janice Hill provided to the state investigator is not material because it is cumulative of the trial testimony of Antonio Shanklin and Tonya Gist exculpating one or both of the Bosses and inculpating McAfee.[12] According to the state, there is no reason to think the jury would not have disregarded this new evidence just as it disregarded the similar evidence it did hear. The Illinois Appellate Court embraced the state's argument regarding this issue without reservation, but the district court declined to accept or reject the argument.

In our view, the state's argument miscaracterizes the nature of the evidence the Bosses discovered on the basis of Janice Hill's statements to the state investigator. This evidence is not simply cumulative; it differs in at least two significant ways from the testimony of Antonio Shanklin and Tonya Gist. First, according to the uncontradicted rep-

---

[12] The state does not directly address the materiality of Janice Hill's statements themselves, presumably on the assumption that her statements would be inadmissible hearsay. We need not resolve this evidentiary issue because the evidence discovered on the basis of Janice's statements is material standing alone.

resentations of the Bosses' counsel, two of the three witnesses discovered (Richard Mitchell and Marcus Fowler) are neutral and disinterested witnesses, which distinguishes them from Shanklin and Gist who, as the prosecution emphasized at trial, both have connections to the Bosses. We have previously recognized that independent corroboration of the defense's theory of the case by a neutral and disinterested witness is not cumulative of testimony by interested witnesses, and can undermine confidence in a verdict. *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000); *Montgomery v. Petersen*, 846 F.2d 407, 415 (7th Cir. 1988).

Second, the testimony that the newly discovered witnesses would have given (that McAfee admitted participating in the attack on Oliver and admitted that the Bosses were not involved) is of a different nature than that given by Gist and Shanklin. It involves a confession by McAfee, the state's key witness, that he committed the crime the defendants were charged with and that he lied about the defendants' participation in that crime. This is different and in many ways more significant evidence than testimony that two eyewitnesses believe they saw McAfee take part in the attack on Oliver. *Cf. Redmond*, 240 F.3d at 591-92 (discussed *supra*).

For both these reasons, the evidence the Bosses discovered on the basis of Janice Hill's statements to the state investigator cannot be characterized as simply cumulative. It is difficult to say with certainty that the jury would have disbelieved the testimony of the newly discovered witnesses just as it disbelieved Gist and Shanklin. Making such a statement becomes impossible when we take into account how closely balanced the evidence presented at trial was. The evidence presented by the state was not overwhelming. As we have noted, McAfee's testimony was the state's only evidence connecting the Bosses to the attack on Oliver. Therefore, weighing McAfee's credibility was crucial to the jury's determination. The evidence the Bosses discovered on

the basis of Janice Hill's statements presents a direct and substantial challenge to McAfee's credibility and undermines our confidence in the jury's verdict. Therefore, we conclude that the withheld evidence was material for *Brady* purposes.

Although the Illinois Appellate Court's decision reaching the opposite conclusion is not "contrary to" clearly established Supreme Court precedent on *Brady* materiality, the Appellate Court's decision is an "unreasonable application of" that precedent. The Appellate Court did not undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial, which is required under *Kyles v. Whitley*, *supra*. In *Kyles*, the Supreme Court exhaustively examined the suppressed evidence as well as the evidence introduced at trial. It then carefully assessed what purposes the suppressed evidence might have served and how that evidence might have affected the jury's consideration of the evidence that was introduced. 514 U.S. at 441-54.

By contrast, the Illinois Appellate Court's discussion of whether the Bosses could satisfy the materiality requirement is little more than a conclusion that the excluded evidence, because it was cumulative, was not likely to be believed. The court did not consider the impeachment value the new evidence might have had or the differences between the new evidence and the testimony of Shanklin and Gist. Nor did the court assess the relative strength of the state's case against the Bosses or how the new evidence might call the state's case into question. As we noted above, all of these considerations have considerable significance in this case. But we do not conclude that the Illinois Appellate Court's decision was unreasonable because not well-reasoned. *Accord Hennon*, 109 F.3d at 334-35. Rather, we believe that the Illinois Appellate Court's conclusion, that the evidence discovered on the basis of Janice Hill's statements

was not material because cumulative, was unreasonable on the facts and circumstances of this case. Therefore, we find that the Bosses have satisfied the standard for habeas corpus relief with respect to the materiality requirement for a *Brady* claim.

III. CONCLUSION

As the Bosses have satisfied the standard for habeas corpus relief with respect to each of the requirements for a *Brady* claim, the district court erred in denying the Bosses writs of habeas corpus. Accordingly, we REVERSE the judgment of the district court and REMAND the case with instructions to grant the Bosses writs of habeas corpus unless the state retries them within 120 days.

FLAUM, *Chief Judge*, dissenting. Like the majority, I share a sense of concern regarding the circumstances of this case. Given the facts before us, the preferable course of action would have been for the trial judge to grant the defense a continuance so that they could have further investigated any additional information which might have been provided by witness Janice Hill. Nevertheless, I am unable to conclude that the Bosses are entitled to a writ of habeas corpus under the standard mandated by 28 U.S.C. § 2254(d)(1) as interpreted in *Williams v. Taylor*, 529 U.S. 362, 402-13 (2000). In my judgment, the Illinois Appellate Court's determination, that no evidence from Hill was suppressed by the prosecution since she was a cooperative defense witness, cannot be labeled an unreasonable application of *Brady* in light of the controlling jurisprudence.

I agree with the majority that the Illinois court's decision was not "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). Thus, I address only whether the decision is an unreasonable application of such law. The Illinois Appellate Court's decision fits into a line of circuit cases rejecting *Brady* claims based on evidence that could have been discovered by the defense with reasonable diligence, *see, e.g., Chandler v. Moore*, 240 F.3d 907, 915 (11th Cir. 2001); *United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001); *Johns v. Bowersox*, 203 F.3d 538, 545 (8th Cir. 2000), or where the defense knew or should have known of the essential facts necessary to obtain the exculpatory evidence, *see, e.g., Coleman v. Mitchell*, 244 F.3d 533, 541 (6th Cir. 2001); *United States v. Zichettello*, 208 F.3d 72, 103 (2d Cir. 2000). These cases present a reasonable interpretation of *Brady* since a *Brady* violation can occur only if evidence is suppressed, and, generally, evidence available to the defense cannot be so characterized.

In deciding whether potentially exculpatory evidence could have been found through reasonable diligence, our court focuses on whether the defense had knowledge of the material containing such evidence and the same degree of access as the prosecution. *See United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996); *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996). To defeat a *Brady* claim, the defense need not be aware of the specific details of the exculpatory information or precisely what it is so long as the defense knew of and had access to the material that contained, or the witness who possessed, such information. *See, e.g., United States v. Senn*, 129 F.3d 886, 892-93 (7th Cir. 1997); *Parks*, 100 F.3d at 1037.

Respectfully, I cannot find the Illinois Appellate Court's decision wanting under these standards. Both of the Bosses clearly were aware of Janice Hill, as she testified in favor of one of the defendants, Randy. Since Randy and Revell

were tried jointly, Revell must have also known of Hill. Additionally, the Bosses had at least as much access to Hill as the state did considering that she was one of their witnesses. The defense was aware that Hill had evidence relevant to the crime and had ample opportunity to interview Hill in order to obtain all of the information she knew about Eugene Oliver's death, including Robert McAfee's involvement. The Bosses have not demonstrated or suggested that Hill was uncooperative or that they otherwise would have had more difficulty in obtaining information from Hill than the prosecution did.

The majority seeks to cabin the need for the defense to be reasonably diligent through a variety of distinctions that are, in my view, unavailing. The reasonable diligence requirement has frequently been applied to evidence that was unwritten. *See, e.g., United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997); *Hoke v. Netherland*, 92 F.3d 1350, 1355-56 (4th Cir. 1996). Indeed, obtaining information through questioning often requires less diligence than sorting through papers. Thus, the fact the proposed evidence in question was contained in Hill's mind rather than a document is not a reason for excusing the defense's not uncovering information known by one of their own witnesses.

In addition, a specific lead is not necessary for a reasonably diligent defendant to discover exculpatory information; knowledge of and access to a witness usually are sufficient. *See, e.g., Wright v. Hopper*, 169 F.3d 695, 702 (11th Cir. 1999); *Hoke*, 92 F.3d at 1355-56; *United States v. Hicks*, 848 F.2d 1, 4 (1st Cir. 1988); *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988). The majority's quotation from our decision in *United States v. Hamilton*, 107 F.3d 499, 508-09 (7th Cir. 1997) demonstrates this proposition. *Hamilton* does not rest on the defense's possession of information indicating what specific questions a witness should have been asked. Rather, by the simple fact that the bank teller in *Hamilton* was a witness the defense should have

known to ask whether he had given any prior statements to the police. *Id.* Similarly, in the days before trial the Bosses' attorneys readily could have asked Hill if she had learned any additional information relevant to the case since their previous interview.

The Illinois Appellate Court's decision does not disrupt the prosecutor's duty to seek justice before victory. *Brady* was never meant to displace our adversary system of justice, *United States v. Bagley*, 473 U.S. 667, 675 (1985), and does not require the prosecution to assist in presenting the defense's case, *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992). Even after *Brady*, defendants are still required to conduct thorough investigations of witnesses which they know may have useful information.

Furthermore, and perhaps most significantly, cases denying *Brady* claims often have relied on the fact that the witness with the exculpatory material was either a defense witness or cooperated with the defense. *See Stockton v. Murray*, 41 F.3d 920, 925 (4th Cir. 1994); *United States v. Dean*, 722 F.2d 92, 95 (5th Cir. 1983); *United States v. Natale*, 526 F.2d 1160, 1171 (2d Cir. 1975). Against the backdrop of this case law, it is difficult to conclude that the Illinois Appellate Court unreasonably applied the Supreme Court's directives regarding *Brady*.

The foregoing is not meant to suggest in any way a broad, strict rule that *Brady* is in all circumstances inapplicable to information obtained by the prosecution from defense witnesses. As the majority appropriately recognizes, a defense witness may forget information, may be reluctant to provide certain information to the defendant, or may become hostile to the defense, *cf. In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 893 (D.C. Cir. 1999). Perhaps the refusal to recognize the possibility of a *Brady* violation in such circumstances would be an unreasonable refusal to extend a legal principle. *Cf. Williams*, 529 U.S. at

408-09. However, we are not presented with such circumstances. The Bosses have made no claim that Hill was unwilling or unable to provide the information she possessed. Hence, based on the record before us, I am simply unable to find sufficient support for the grant of the writ of habeas corpus and must therefore respectfully dissent.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 26, 2001

Before

Hon. Joel M. Flaum, *Chief Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Ann Claire Williams, *Circuit Judge*

No. 98-3665

Randy Boss and Revell Boss,

Petitioners-Appellants,

v.

Guy Pierce and Mark A. Pierson,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2874—**James B. Moran**, *Judge*.

ORDER

On September 13, 2001 respondents-appellees filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.

Supreme Court, U.S.
FILED
FEB 22 2002
OFFICE OF THE CLERK

No. 01-1369

In the

Supreme Court of the United States

GUY PIERCE and MARK A. PIERSON,

Petitioners,

v.

RANDY BOSS and REVELL BOSS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois

JOEL D. BERTOCCHI
Solicitor General of Illinois

WILLIAM L. BROWERS
COLLEEN M. GRIFFIN
Counsel of Record
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-4684

Counsel for Petitioners

Printed by Authority of the State of Illinois (P.O. 29501—56—3-11-02)

28pp

TABLE OF CONTENTS
TO SUPPLEMENTAL APPENDIX

Page

Memorandum and Order of the United States District Court for the Northern District of Illinois dated September 14, 1998 ..... Supp. App. 1

[Dated September 14, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. RANDY BOSS and REVELL BOSS,	)	
Petitioners,	)	
vs.	)	No. 97 C 2874
GEORGE DETELLA, Warden, Stateville Correctional Center,	)	
Respondent.	)	

MEMORANDUM AND ORDER

Petitioners Randy and Revell Boss, inmates at Stateville Correctional Center in Joliet, Illinois, serving sentences for robbery and first-degree murder, have brought this petition for habeas corpus, claiming that the trial in which they were convicted of these crimes had several constitutional errors. Specifically, they argue that 1) they were denied their due process right to present their theory of the case when the trial court refused to give an "accomplice instruction" to the jury; 2) they were deprived of their Sixth Amendment right to confront witnesses against them when the state informed the jury that non-testifying witnesses had accused them; 3) the trial violated the Sixth Amendment because prosecutors made an improper reference to one witness' prior consistent statement; 4) the Sixth Amendment was again violated when the trial court improperly restricted defense counsel's lattitude [sic] on cross examination; 5) their counsel was ineffective for failing to ask for a jury instruction on one witness' potential bias; 6) the state withheld exculpatory evidence in violation of the

Supreme Court's ruling in *Brady v. Maryland*; 7) they were deprived of due process when the trial court rejected their motion to have an evidentiary hearing in connection with their motion for a new trial. For the reasons stated below, petitioners' claims are denied.

BACKGROUND

Petitioners Randy and Revell Boss were convicted by a Cook County jury of the first degree murder of Eugene Oliver. The trial court sentenced Randy Boss to concurrent terms of 50 years for murder and seven years for robbery, and sentenced Revell Boss to forty years for murder and seven years for robbery. Two other defendants, Nikia Harris and Corey Carter, were charged with the same crimes but were tried separately and are not party to this petition.

The facts as determined by the state appellate court are as follows:

> Robert McAfee, who was 16 years old at the time of his testimony, was the State's key witness. He testified that on the evening of September 6, 1993, he was picnicking with his family in Garfield Park in Chicago. At approximately 10:45 p.m. that evening, Robert's family left the park and returned home in their car, while Robert headed for home on his bicycle.
>
> At the corner of Franklin and Drake, Robert stopped to talk to a girl who was leaning out of a window. After about a minute, the girl closed the window. Across the street, Robert observed four men standing outside the senior citizens' home located at 440 North Drake, drinking beer. A woman he did not know was with them. He knew that the men's first names were Keater, Corey, Randy and Vell. He did not know their last names, with the

exception of Corey's, which he knew to be Carter. Robert positively identified defendants in court as Randy and Vell. Although he did not hang around with defendants, who were older than he was, he knew them from the neighborhood.

Robert saw a man, later identified as Oliver, come out of the senior citizens' home, turn left and walk to Franklin. The men began to follow the man. Randy approached McAfee and asked him if he could use his bicycle. When McAfee said no, Randy kicked the bike and took it from him. McAfee started to chase him.

During this time, the man, who had exited the senior citizen's home and had been walking west on Franklin, entered Central Park. Randy, who was riding McAfee's bicycle, caught up with the man and threw the bicycle at his legs, causing him to fall. Robert observed this from where he had stopped across the street on Franklin. Although McAfee did not remember where they came from, Corey, Keater and Vell were also present. The four men began beating Oliver. Oliver managed to pull out a knife, but Carter knocked it away. The group of four men repeatedly kicked Oliver in the face and on his side. Randy picked up the bicycle and threw it on Oliver's head three times. McAfee identified the bicycle in court and demonstrated the manner in which Randy threw the bicycle at Oliver.

Randy, Keater and Corey had their hoods pulled onto their heads, but Revell did not. Nevertheless, McAfee had no trouble seeing their faces. The street lights were all working. The beating, which McAfee stood watching, lasted about a minute. Afterwards, Oliver was not moving. McAfee saw Randy reach into Oliver's pocket.

The four defendants walked past McAfee, at which time McAfee saw that Randy had a $20 bill in his hand. McAfee heard one of them say that they were going to the store for beer. Randy told McAfee, "Don't say nothing, don't tell nobody." McAfee then retrieved his bicycle which was in the park near Oliver, who was making sounds that McAfee could not distinguish. The crank was bent so McAfee pushed his bicycle home. Because of Randy's threat, he did not mention the incident to anyone. He eventually told the police what happened when they brought him in for questioning.

At this point in McAfee's testimony, the prosecution raised the issue of his prior adjudication for manslaughter. When McAfee was 13 years old, his friend, Tyrone Johnson, was killed while he and Johnson were playing with a gun in Johnson's basement. The adjudication raised the issue of McAfee's credibility because when first questioned by police, McAfee said that Johnson had shot himself. Later that day he told the truth, stating that he originally lied about the incident because he was scared. At the time of trial in this case, McAfee was still on probation for manslaughter.

On cross-examination, defense counsel elicited testimony from McAfee that his nickname was "Coochie," and the he originally lied to police about Johnson's death because he was scared. McAfee admitted that he was also scared when questioned by the police concerning this case. He was not photographed or fingerprinted, but was placed in a line-up. He went home the same day, after being interviewed. McAfee testified inconsistently regarding the fact that he told an assistant State's Attorney and the grand jury that Corey, Keater and Revell ran toward the victim, but at trial stated

that they walked toward the victim. He also did not remember how many times the men kicked the victim or which foot each of them used.

Detective Gene Harris of the Chicago Police Department, who was assigned to the case on September 23, 1993, testified for the State as to the various steps he took during his investigation of the murder. Based on conversations with Beulah Williams and Melvilet Moore, who provided descriptions, names and the address, 445 North Drake, of the possible offenders, Harris found Keater, who admitted that his real name was Nikia Harris, standing in front of that address. Harris placed Keater under arrest and took him to the police station. After interviewing Keater, Harris placed Carter under arrest. After interviewing Carter, Harris arrested defendants.

Harris testified that he took McAfee, a witness to the incident, to the police station to be interviewed. He did not believe McAfee was a suspect, but nevertheless called a youth officer and gave McAfee his *Miranda* rights upon questioning. Harris did not arrest McAfee. Harris acknowledged that he wrote in his report that McAfee "hooked up" with defendants and also admitted that McAfee was mistakenly listed as an arrestee on defendants' arrest reports, which were prepared by another officer but signed by Harris. He also testified that the arrest reports he prepared and typed for Carter and Harris listed McAfee as an arrestee, but he never prepared an arrest report for McAfee. Although he did not remember placing McAfee in a line-up, Harris stated it was police practice to use individuals at the station as fillers for line-ups. After he interviewed McAfee., he took him home.

Beulah Williams, Oliver's girlfriend, testified for the State that on Labor Day, 1993, shortly before 11:00 p.m., Oliver went to the store. He never returned.

Assistant Cook County Medical Examiner Larry Simms testified that Oliver sustained many external injuries, along with internal cranial injuries. He further testified that the cause of death in this case was cerebral injuries due to blunt trauma. Oliver died approximately three weeks after he was beaten.

The defense called four witnesses. Antonio Shanklin stated that he witnessed the beating of Oliver. He saw about four or five boys beating up one man. He saw one of them pick up a bicycle and hit the man with it, but could not see who that person was because he was too far away. However, the person who hit Oliver with the bicycle, got on the small, red bicycle, after fixing the chain, and rode past him. That person was McAfee, whose face he saw for the first time on the corner of Franklin and Central, after the victim had been beaten. Shanklin testified that there was no interruption in his vision and that he never saw McAfee on the red bicycle again. The rest of the boys ran past Shanklin. They were about 30 or 40 feet away from him. He had never seen them before.

When asked whether defendants, who he had known for about three years from the neighborhood, were in the group that ran past him, Shanklin replied, "No, they weren't." While the fight was in progress on the west side of the park, he saw Revell on the east side of the park. He never saw Revell cross over to where the fight was. Shanklin had never seen the bicycle which was shown to him

as the State's exhibit during the trial. He never contacted the police or the state's Attorney's office about his knowledge of the crime. Defendants' family asked him to testify.

Contina Hill, Randy's girlfriend and the mother of his child, testified for the defense that on September 6, 1993, Randy was home with her all day, leaving only twice. The first time he left he went to Gregory Carter's apartment downstairs. Gregory Carter is Corey Carter's cousin. The second time he left was at night with Gregory and two other men. When Randy and Gregory returned a short time later, they had beer. Contina never contacted law enforcement officials regarding her belief that Randy could not have committed the crime.

Janice Hill, Contina's sister, testified for the defense, corroborating her sister's testimony and adding that when Randy left the apartment the second time, he was gone approximately 15 minutes. She also did not notify law enforcement officials regarding her belief that Randy could not have committed the crime.

The fourth and final defense witness was Tonya Gist, who testified that on the night of the murder she witnessed McAfee fighting an older man from the senior citizens' home. A large crowd was standing around. She proceeded home, where she shared a back porch with Contina Hill, and saw Randy sitting there. He was still there when she locked the gate later that evening. Revell came over sometime after Tonya got home[.] She too never told any law enforcement officials about what she had witnessed.

Following the instruction conference, the defense moved for a continuance due to an investigative

> report they received from the State allegedly that day, the last day of trial, which was based on the State's interview of defense witness Janice Hill on June 24, 1994. The report was prepared in response to Randy's answer to discovery filed on June 23, 1994, five days before trial. In that report, which was prepared by Investigator Joseph D. Fallon, Hill stated that Coochie (McAfee) was bragging around the neighborhood about "what he and his friends did to that man." She also stated that a man named Richard Mitchell was allegedly told by McAfee that the only reason McAfee said that defendants committed the murder was so that McAfee would not get into trouble[.] The defense request him to locate Mitchell, whereupon the State responded that Hill was a defense witness and the defense certainly had had the opportunity to interview her. Counsel for Revell stated that Hill was Randy's alibi witness and that counsel for Revell had not discussed her testimony with her. The trial court denied the motion. The defense did not object as to the timing of the State's disclosure of the investigative report. Based on the information obtained, new defense counsel conducted an investigation that produced the written statements of Marcus Fowler and Ricky Boss and the statement by telephone of Richard Mitchell that McAfee had told them that he, not defendants, committed the offense.

People of Illinois v. Boss, No. 93 CR 23556 (Order of the Illinois Appellate Court), p. 2-9. Petitioners filed, and the trial court denied, a motion for a new trial, which apparently incorporated the information from the Janice Hill statement. Petitioners also filed a direct appeal in Illinois which stated exactly the same claims that they present in this petition for habeas corpus. In fact, petitioners' counsel did not compose briefs in support of this claim for habeas

relief, but instead simply refers this court to the documents filed on appeal. In any event, the Illinois court denied that appeal on all claims.

ANALYSIS

I. *Standard of Review*

Because each of petitioners' arguments were raised on his direct appeal to the Illinois Appellate Court, which affirmed the trial court's ruling after considering the merits of their claims, his habeas corpus claim must meet the requirements of 28 U.S.C. §2254(d)(1) or (2) before this court can reconsider these claims. The relevant section provides:[1]

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Seventh Circuit has addressed the meaning of this relatively new statute at considerable length in *Lindh v.*

---

[1] On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which modified the habeas corpus statute, 28 U.S.C. §2254, by moving the old subsection (d) and the one listed here.

Murphy, 96 F.3d 856 (7th Cir. 1996), where it denied a prisoners' habeas corpus petition on the grounds provided in section (d). The petitioner in that case appealed to the Supreme Court, which has granted *certiorari* only with respect to the issue of when the statute became effective and whether it applies retroactively. *Lindh v. Murphy*, No. 96-6298, 117 S.Ct 726 (Jan. 10, 1997); *see also* Petitioner's Brief to Supreme Court, 1997 WL 82672, Count I.

The *Lindh* court noted that the first part of section (d)(1) (the "contrary to" phrase) focuses only on the state court's resolution of questions of law and permits the lower federal courts to grant habeas petitions when the state court's ruling violates a ruling of the Supreme Court, but not when it conflicts only with the ruling of a lower federal court. *Lindh*, 96 F.3d at 869. Thus, the habeas petitioner must be able to point to such a ruling or his claim will not prevail under that subsection. The second part of section (d)(1) (the "unreasonable application" phrase) focuses on "mixed questions of law and fact" and permits a federal court to grant a habeas petition if the state court's application of the law to the facts is based on "an error grave enough to be called 'unreasonable.'" *Lindh*, 96 F.3d 870. Obviously, "unreasonable" is difficult to precisely define and will inevitably depend on all of the circumstances attendant to the state court's decision, but the Seventh Circuit has noted that "a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgement." *Id.* at 871.

Section (d)(2), by contrast, allows the federal court to grant a habeas petition where the facts relied on at trial were simply not a reasonable interpretation of the events in light of evidence presented. 28 U.S.C. §2254(d)(2). Note, however, that under section (e)(1) the trial court's determination of factual issues is presumed to be correct and petitioner can rebut this presumption only upon a showing

of clear and convicting evidence to the contrary. 28 U.S.C. §2254(e)(1). In this case, the petitioners do not point to any new evidence or clear error of fact by the trial court. As mentioned above, the brief they submitted in support of their habeas petition simply incorporates by reference the brief submitted in support of their direct appeal in state court and no additional argument is made. In that appeal, petitioners did not argue directly that the jury incorrectly interpreted the facts, and upon reviewing the evidence none of the factual determinations appears unreasonable if McAfee's testimony is credited. Rather, petitioner contends that the jury credited that testimony because of errors. Accordingly, we deny the petition for habeas corpus insofar as it was premised on section §2254(d)(2) and the remainder of this opinion will consider whether petitioners' claims are cognizable under (d)(1).

II. *Accomplice Instruction*

Petitioners first argue that they were denied their due process right to present their theory of the case when the trial court refused to give the jury an "accomplice instruction," which would have instructed the jury to be suspect of McAfee's testimony because he may have been an accomplice. It has been established, however, that a court's failure to give an accomplice instruction does not rise to the level of a constitutional violation, particularly where other evidence corroborated the alleged accomplice's verison of events. *See, e.g., Kappos v. Hanks*, 54 F.3d 365 (7th Cir. 1995) (holding that "[a]lthough cautionary accomplice instructions are preferred in the federal courts . . . the failure of a state court to give such an instruction does not rise to the level of a constitutional violation), *citing United States ex rel. Swimley v. Nesbitt*, 608 F.2d 1130, 1133 (7th Cir. 1979); *Jackson v. Hutto*, 508 F.2d 890 (8th Cir. 1975) (holding that the trial court's failure to give an accomplice in-

struction would not raise an issue of constitutional magnitude and consequently a claim based on such omission was not cognizable in habeas corpus) (citations omitted). Habeas relief is available only for violations of federal law as determined by the Supreme Court, whereas questions regarding the necessity of jury instructions primarily involve questions of state law. *See United States ex rel. Peery v. Sielaff*, 615 F.2d 402, 403 (7th Cir. 1979) (holding that an omitted jury instruction is much less likely to raise a constitutional issue on habeas than is an erroneous one); *Grant v. Rivers*, 920 F.Supp. 769 (E.D.Mich. 1996) (holding that trial court's failure to provide an "accomplice instruction" was not reviewable on petition for habeas corpus because omission did not constitute a violation of federal or constitutional law). Accordingly, we find that petitioners' claim that they were entitled to the accomplice instruction is inappropriate for habeas review.

III. *Right to Confrontation*

Petitioners next argue that their Sixth Amendment right to confront their accusers, applied to the states through the Fourteenth Amendment, was violated when a state witness, Officer Harris, testified that his interviews with two witnesses to the murder led him to a string of additional interviews and evidence which eventually resulted in the arrest of Randy and Revell Boss. *See* Appellant's Brief (App. Brief), p. 22; App. Op. at 15-16. Petitioners claim that although Illinois rules of evidence permit police officers to testify about events that led to the instigation of an investigation or arrest, the application of that rule in this case conflicted with the constitutional requirements of the Confrontation Clause, and the state rule must consequently give way. On appeal, the Illinois court addressed this argument and concluded that because "Officer Harris did not testify as to the contents of his conversations with [the

witnesses]" and because "when he attempted to do so, defendant's objections were sustained by the trial court," Harris' testimony about the investigation was properly admitted and did not violate the Sixth Amendment. We agree.

Determining whether the admission of hearsay violated a defendant's right to confront the witnesses against him requires a two-part inquiry. We must first determine whether the testimony at issue did, in fact, constitute hearsay under the relevant state law. *Miles v. Burris*, 54 F.3d 284, 288-89 (7th Cir. 1995). If this inquiry is answered in the positive, we must then determine whether the offending testimony had a "substantial and injurious effect or influence on the jury's verdict." *Id.* In Illinois, a police officer may testify about what steps he took during his investigation that led him to target a particular suspect, "even if a jury would conclude that the police began looking for a defendant as a result of what non-testifying witnesses told them, as long as the testimony does not gratuitously reveal the substance of their statements and so inform the jury that they told the police that the defendant was responsible for the crime." *People v. Henderson*, 568 N.E.2d 1234, 1256 (Ill. 1990) *cert. denied Henderson v. Illinois*, 502 U.S. 882 (1991); *People v. Johnson*, 506 N.E.2d 563, 568 (Ill. 1987). Similarly, federal courts have held that "[a]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." *Miles v. Burris*, 54 F.3d 284, 288, n.1 (7th Cir. 1995) *quoting United States v. Lazcano*, 881 F.2d 402, 407 (7th Cir. 1989). Thus, where an officer limits his testimony to the fact that he received information from witnesses that caused him to investigate a certain person, but does not reveal the content of the conversation, the defendant's confrontation rights are not usually an issue. *Id.* In this case, the petitioners acknowledge that Officer Harris did not reveal the content of what the witnesses relayed to him, but

argue that the only logical conclusion that jurors could have drawn from his testimony is that the witnesses said something that implicated Randy and Revell Boss and claim that this result violates the Supreme Court's decision in *Pointer v. Texas*, 380 U.S. 400 (1964). We disagree. First, in *Pointer v. Texas* the Supreme Court held that the right to counsel in state criminal proceedings recently incorporated into the Fourteenth Amendment's due process clause in *Gideon v. Wainwright*, 372 U.S. 335 (1962), includes the right to effectly cross-examine the witness. 380 U.S. at 403 (1964). That does little to support petitioner's [sic] claim here. Second, because Officer Harris testified only about what led him to initiate the investigation and did not reveal what witnesses actually said to him, his testimony is not considered hearsay under Illinois law. Since his statements do not constitute hearsay, his testimony cannot implicate the Confrontation Clause on that ground. In the absence of any other argument we find that Officer Harris testimony did not offend federal or constitutional law and was properly admitted.

IV. *Evidence of Defendant's Prior Consistent Statement*

Petitioners next argue that they were again denied their Sixth Amendment rights and due process when the prosecutor at their trial, during both McAfee's direct examination and closing statements, referred to the fact that McAfee had given a prior consistent statement to the police. Although petitioners' counsel at trial objected to the comment made during the course of the trial, he did not object to the same conduct during closing arguments. We address the two separate instances of prosecutorial misconduct separately and find that in this case neither instance warrants habeas relief.

With respect to the prosecutor's comments during closing argument, in *Wainwright v. Sykes* the Supreme Court ruled

that a federal habeas petitioner who failed to comply with a state's contemporaneous objection rule at trial must show cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim (commonly called the "cause and prejudice" standard). 433 U.S. 72, 87 (1977); *Williams v. Chrans*, 894 F.2d 928, 935 (7th Cir. 1990) (holding that "when a state court relies explicitly on a state procedural default rule in declining to review a federal question, a federal court sitting in habeas corpus jurisdiction must accept that determination as an "adequate and independent state ground" for decision of the issue["] and *citing Harris v. Reed*, 489 U.S. 255 (1988)). If petitioner cannot show cause for or prejudice from the default, the federal court hearing the habeas petition will entertain the defaulted issue only if petitioner demonstrates that the court's failure to consider the federal claim would result in a fundamental miscarriage of justice. *Williams v. Chrans*, 894 F.2d 928, 935 (7th Cir. 1990) *citing Murray v. Carrier*, 477 U.S. 478, 485 (1986).

In this case, petitioners argue that the prosecutor's reference to McAfee's prior consistent statement during closing arguments irreparably prejudiced the jury against them because it greatly enhanced McAfee's credibility, who was the key witness against both defendants. Although we agree that the prosecutor's comments were improper, such misconduct alone is not sufficient to merit habeas relief. "The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1985) (internal quotations omitted). Under this standard we agree with the Illinois Appellate Court's determination that the prejudicial effect of the improper elements of the closing argument were minimal. First, errors of state law such as the improper admission of evidence are generally not sufficient to support

a writ of habeas corpus unless it appears that the trial as a whole "posed an unacceptably great risk of convicting an innocent person, and the judicial process therefore denied the accused due process of law." *Gonzalez v. DeTella*, 127 F.3d 619, 621 (7th Cir. 1997). Here, the statement's potential prejudicial effect was mitigated by the fact that the person who testified to McAfee's prior consistent statement in an attempt to bolster his credibility was McAfee himself. As the Illinois court observed, "the jury would not have been inclined to attribute significantly more credibility to McAfee because he provided his own corroboration." App. Op. at 18 *citing People v. Henderson*, 568 N.E.2d 1234 (Ill. 1990). Furthermore, we note that the prosecutor's statement was but one piece of a substantial amount of evidence admitted at the Boss brothers' trial. These various factors lead us to conclude that there was neither cause for their failure to object to the prosecutor's improper reference to McAfee's prior statement, nor prejudice from the same.

Petitioners also object to the prosecutor's questioning McAfee about his prior consistent statements implicating the Boss brothers in the murder during McAfee's direct examination. In contrast to the closing argument scenario described above, petitioners' attorney objected to the question at the time and the trial judge sustained that objection. *See* App. Op. at 17. Nonetheless, petitioners maintain that the mere mention of the prior consistent statement tainted the conviction. We disagree. As one court in this jurisdiction has observed.

> In a *habeas corpus* petition we will not review the evidentiary analyses of the state courts unless a specific constitutional right has been violated or error has made the trial fundamentally unfair. *See United States ex rel. Clark v. Fike*, 538 F.2d at 757. Courts have consistently held that the admission of a prior consistent statement when the declarant is

> available for cross examination at trial, as [the witness] was here, is not a question that rises to a constitutional level. *See California v. Green*, 399 U.S. 149, 157 (1970) ("the Confrontation Clause is not violated by admitting a declarant's out-of-court statement, as long as the declarant is testifying as a witness and subject to full and effective cross-examination"); *U.S. v. Dunn*, 851 F.2d 1099, 1101 (8th Cir. 1988) ("The availability of the declarant at trial vitiates the main concern of the hearsay rule, which is the lack of opportunity for cross-examination"); *U.S. ex rel. Bryant v. Vincent*, 373 F.Supp. 1180, 1184 (S.D.N.Y. 1974) (question of hearsay not cognizable in a federal *habeas corpus* proceeding where declarant was cross-examined at trial).

U.S. ex rel. Gonzales v. DeTella, 918 F.Supp. 1214, 1222 (N.D.Ill. 1996); *see also Henderson v. Norris*, 118 F.3d 1283, 1286 (8th Cir. 1997) (holding that because Arkansas law did not consider the admission of a prior consistent statement during redirect fundamentally unfair to the defendant, such statement did not warrant habeas relief). Petitioners' counsel makes no attempt to address or distinguish this case from the clear precedent on this issue, and our independent review of this claim has failed to reveal any evidence that would lead us to conclude that the prosecutor's inappropriate reference to McAfee's prior statement was so egregious as to render the entire trial fundamentally unfair.

V. *Restrictions on Cross-Examination*

Petitioners next claim that the trial court violated the Confrontation Clause by improperly restricting the defense's cross-examination of McAfee regarding 1) his state of mind when he was questioned by the police about the murder and 2) lies that he allegedly told the police in connection with a homicide adjudication in which he was in-

volved as a juvenile. Petitioners also contend that the court should have prevented the prosecution from arguing that the homicide committed by McAfee as a juvenile was actually an "accident."

"The Sixth Amendment's Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Quinn v. Neal*, 998 F.2d 526, 528 (7th Cir. 1993). The Fourteenth Amendment applies these rights to trials conducted in the state courts. *Id.* at 528-29. At trial, the defense has the right to conduct reasonable cross-examination of the witnesses testifying against the defendant concerning matters which may demonstrate that the witness is biased or motivated to testify falsely. *Id.* at 529. At its discretion, however, the court may limit defense counsel's inquiry into these matters if it determines that the questions have the effect of harassing the witness, prejudicing the jury, confusing the issues, threatening the witness' safety, or determines such questioning is repetitive or only marginally relevant. *Id. citing Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (*per curiam*).

A trial court's erroneous limitation on defense cross examination might in certain circumstances constitute a Sixth Amendment violation entitling a prisoner to habeas relief. As in the case with several of petitioners' previous claims, however, such limitations are determinations about the admission of evidence, typically a state concern. *See U.S. ex rel. Bryant v. Washington*, 869 F.Supp. 601, 603 (N.D.Ill. 1994). Here, Illinois allows the trial court a substantial amount of discretion in determining the proper scope of cross examination. *People v. Dortch*, 441 N.E.2d 100, 105 (Ill. App. 1982). To challenge the court's limit on cross examination, petitioner must show that the allegedly wrongful restriction rendered the entire trial fundamentally unfair. *Sellers v. Ward*, 135 F.3d 1333, 1343 (10th Cir. 1998).

In this case, petitioners' first claim that they were wrongfully prevented from asking McAfee if he was concerned that he might be a suspect in the murder when the police initially questioned him about the incident. As the appellate court observed, however, the trial record shows that the defense was ultimately permitted to question McAfee about what his mental state was when the police approached him and thus this claim does not implicate the Sixth Amendment. *See* App. Op. at 19-20. Petitioners next argue that the trial court erred when it prevented the defense from questioning McAfee about a lie he supposedly told in the past when he was being investigated for a juvenile homicide.[2] The trial court determined the previous out-of-court lie was hearsay.

Once again, this is an evidentiary matter that ordinarily would not implicate constitutional concerns. Illinois law clearly permits a trial court to limit cross examination in this matter. *See* App. Op. at 21-22. Moreover, applying the Sixth Amendment standard described above, we find that the testimony would have been repetitive, unreliable and of questionable relevance under the Sixth Amendment analysis described above. McAfee had already been subject to the defense's cross examination on matters key to impeach-

---

[2] As a juvenile, McAfee was investigated and ultimately found responsible for the accidental shooting death of a friend while the two were playing with guns at McAfee's house. During that homicide investigation, McAfee initially denied being involved in the incident. At trial, the defense wanted to question McAfee about a conversation he supposedly had with a person named Ira Fox after he had shot his friend. According to the defense, McAfee had told Fox that he had denied shooting his friend and the defense wanted to use this information to impeach McAfee's credibility. The trial judge rejected the testimony because Fox was not present and the judge had already given wide latitude in impeaching McAfee.

ment, including several witnesses claiming that they saw McAfee participate in the murder for which the Boss brothers were convicted and the fact that he was involved as a juvenile in another homicide—all powerful impeachment evidence. In short, the trial court gave the defense ample opportunity to impeach McAfee, and the trial court properly applied Illinois law in excluding the hearsay. Thus, there is no reason to conclude that the trial court's restriction on cross examination had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Finally, petitioners claim that the prosecution should have been prevented from referring to the homicide that McAfee was involved in as a juvenile as an "accident." As with the prosecutor's comments in closing argument discussed above, however, the defense failed to object to this matter at trial and is consequently barred from raising the issue now.[3]

VI. *Ineffective Assistance of Counsel*

Petitioners next argue that they are entitled to relief from their conviction because their trial counsel was ineffective by failing to request an instruction ordering the jury to disregard hearsay testimony at trial. Petitioners, however, fail to state to what hearsay testimony they are referring and have thus failed to "set forth in summary form the fact supporting each of [their] grounds" for habeas corpus and have consequently failed to state a cognizable claim. 28

---

[3] Having determined that petitioners' claims of prosecutorial misconduct addressed in this section and the preceding one are meritless, we need not address petitioners' fifth argument in which he [sic] claims that the cumulative impact of these alleged improprieties deprived him [sic] of due process of law. *See* App. Brief, at 32.

U.S.C. §2254, Rule 2(c). *See also Strickland v. Washington* 466 U.S. 688, 690 (1984) (holding that "the defendant must identify the specific acts or omissions of counsel that formed the basis for his claim of ineffective assistance").

Petitioners also contend that their defense counsel should have sought a jury instruction explaining that the key prosecution witness McAfee was self-interested and biased, rendering his testimony somewhat suspect. Specifically, petitioners assert the court should have used Seventh Circuit Jury Instruction 3.20, titled "Testimony of Informers," which they argue goes beyond the "accomplice instruction" which they did request and the court denied. Jury Instruction 3.20 provides:

> You have heard testimony that [McAfee] provided information and may have received benefits from the state in connection with this case. You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

In *United States v. Delgado*, the Seventh Circuit set forth the requirements for establishing a claim of ineffective assistance of counsel as follows:

> The defendant bears a heavy burden in establishing an ineffective assistance of counsel claim. He must show (1) that the attorney's representation fell below an objective standard of reasonableness (performance prong), *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and (2) that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different (prejudice prong), *id.* at 694, 104 S.Ct. at 2068. *See also*, *United States ex rel. Barnard v. Lane*, 819 F.2d 798, 802 (7th Cir. 1987); *United States v. Hillsberg*, 812 F.2d 328, 336 (7th Cir.), *cert*

> *denied*, [481 U.S. 1041], 107 S.Ct. 1981, 95 L.Ed.2d 821 (1987). . . . The court's scrutiny of counsel's performance must be conducted with a high degree of deference and without the distorting effects of hindsight. *Id.* at 689, 104 S.Ct. at 2065; *United States v. Sherwood*, 770 F.2d 650, 655 (7th Cir. 1985).

936 F.2d 303 (7th Cir. 1991), *quoting United States v. Moya-Gomez*, 860 F.2d 706, 763-64 (7th Cir. 1988) *cert. denied*, 492 U.S. 908 (1989). Under this standard we find that petitioners' trial counsel performed his duties adequately. Although defense counsel was given ample opportunity to conduct McAfee's cross examination, petitioners are unable to point to any evidence that McAfee "may have received benefits" for his testimony, as the Seventh Circuit instruction provides. Although he was brought into the police station and questioned about the murder during the initial phases of the investigation, McAfee was never given immunity and, according to both the police involved and McAfee himself, was not considered a suspect. It does not appear that McAfee received any advantage by testifying and it consequently cannot be said that trial counsel was objectively unreasonable in failing to request that the jury be instructed to the contrary.

VII. *Withholding of Exculpatory Evidence*

In petitioners' seventh claim, they allege that the prosecution failed to disclose evidence that tended to exculpate them from involvement in the crime. Petitioners claim that on the last day of trial the prosecution gave defense counsel an investigative report which detailed the investigator's interview with a woman named Janice Hill, who is the sister of Randy Boss' girlfriend Contina Hill. *See* Answer to Petition for Habeas Corpus, Exhibit 1, Appendix B. In the interview, Hill stated that she had been home with Randy

Boss and four other people for most of the day from 11:30 a.m. on September 6 to 2:30 a.m. September 7. During that time, she said that Randy had gone out between approximately 3:30 p.m. and 4:00 p.m., as well as between 11:30 p.m. and 12:00 p.m. Because the attack occurred around 10:45 p.m., this testimony, if the times stated are accurate, would corroborate Randy Boss' alibi. In addition, Hill stated that McAfee was a troublemaker, that he had bragged in the neighborhood about participating in the crime, and that he had told a Richard Mitchell that he had only turned Randy in so that McAfee did not get into trouble.

Under *Brady v. Maryland*, the prosecution must disclose any evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S. 83, 87 (1963). This obligation is a requirement of due process. *United States v. Bagley*, 473 U.S. 667, 675 (1984). An item of evidence is deemed material if "the suppressed evidence might have affected the outcome of the trial." *Id.* at 674-75, *quoting United States v. Agurs*, 427 U.S. 97, 104 (1976).

We think, though, that the chronology of events is of some significance here. This is not a case in which the prosecution concealed evidence it had reason to believe was unknown to the defense. The defense, on June 23, 1994, just before the trial commenced, listed Janice Hill as a defense witness. Apparently that was the first time the prosecution was aware of her. The following day an investigator for the state interviewed her and prepared his report. During the trial two defense witnesses testified that they saw McAfee participate in the beating. On June 18, 1994, McAfee testified. The next day the prosecution furnished a copy of the report to the defense and Janice Hill testified thereafter. The defense could have used the report as a basis for questioning McAfee, although there is no reason to believe that he would have admitted he made the statements attributed to him. They were not admissible through Janice Hill. The

defense wanted time to locate Richard Mitchell, and that motion was denied. After the trial was over new defense counsel obtained an affidavit from a Marcus Fowler to the effect that McAfee admitted his participation and information that indicated Richard Mitchell would or might also so testify. The real concern, therefore, is that the failure to turn over the report earlier prevented the defendants from locating and producing Mitchell as a witness before the trial ended.

The appellate court gave as one reason for its decision the fact that McAfee's participation did not negate defendants' participation. Conceptually that is true, but we think that a jury that was convinced McAfee was lying about his own involvement would view his testimony about the involvement of the defendants with some skepticism. We note, however, that the jury rejected testimony of two supposed eyewitnesses, and it is improbable that Mitchell's [(]and Fowler's testimony) would have carried the day. We do not rest on that, however. Even under *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667 (1985), a defendant cannot complain of a failure to disclose when the information was readily available to him[.] *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir.) *cert. denied*, 519 U.S. 868 (1996). Here the government did disclose, during trial, information it had every reason to believe defendants already possessed, as the information was from a recently disclosed, previously unknown to the government, defense witness. Possibly the defense could have located the additional witnesses if the information had been available earlier, and possibly they could have compelled their attendance and possibly they would have testified as defendant [sic] so asserts [sic]. In the circumstances, however, we cannot conclude that the delay in disclosure, or even a failure to disclose, was a constitutional violation.

VIII. *Motion for a New Trial*

In petitioners' eighth and final argument, they claim that the trial court violated their right to due process by denying their motion for a new trial without granting a hearing on the matter. The ground for the motion was the discovery of new evidence, namely the statements of Marcus Fowler (Fowler) and Richard Mitchell (Mitchell), which were obtained as a result of defense's post-trial investigation of the Janice Hill statement discussed above.

Federal habeas corpus relief, however, "is available only to persons being held in state custody in violation of the Constitution or federal law." *Hodges v. Haws*, 955 F.Supp. 958, 965 (N.D.Ill. 1997) (holding that post-conviction relief and the standard under which a post-conviction petition may be summarily dismissed, without an evidentiary hearing, are creatures of state law and consequently are unreviewable by state courts). The right to file a motion for a new trial is a creation of state law. *See* 735 ILCS 5/2-1202. Under Illinois law, a trial court's determination of whether to grant a post-trial hearing to consider new evidence depends on whether the plaintiff can show due diligence in discovering the evidence and demonstrate that the evidence is so conclusive that it would probably change the outcome of the trial. *See Bishop v. Morich*, 621 N.E.2d 43 (1st Dist. 1993), *appeal denied*, 624 N.E.2d 804 (1993). Petitioners in this case have not pointed to any facts indicating that this standard or the trial court's decision summarily denying petitioners' motion for a new trial pursuant to this standard violated federal or constitutional law. Petitioners rely on *Castillo v. U.S.*, 34 F.3d 443 (7th Cir. 1994), to argue that judges should not make determinations regarding witness credibility on the basis of affidavits, a proposition that is generally true. In *Castillo*, however, the trial judge had granted the parties' motion for an evidentiary ruling but then instead of using live witnesses made a decision on the

basis of facts and evidence derived solely from affidavits. In this case, by contrast, the trial judge exercised his considerable discretion under state law and determined that a hearing was not necessary prior to ruling on the motion for a new trial. There is no evidence that the judge's decision on this matter violated federal law or offended due process and corrupted petitioners' trial.

CONCLUSION

For the reasons stated, Randy and Revell's petition for habeas corpus is denied.

/s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

September 14, 1998